

1  
2 UNITED STATES BANKRUPTCY COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
4 Case No. 12-12020-mg

6 | In the Matter of:

7

8 | RESIDENTIAL CAPITAL, LLC, et al.,

9

10 | Debtors.

11

13

14 | United States Bank

15

16 | New York, New York

17 |

18 | May 15, 2014

19 | Page

20

21 | B E F O R E:

22 | HON. MARTIN GLENN

23 U.S. BANKRUPTCY JUDGE

24

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1  
2 Doc# 6827 Motion to Approve/Ally Financial Inc.'s Motion for an  
3 Order Enforcing the Chapter 11 Plan Injunction

4

5 (CC: Doc. No. 6743) Motion of the ResCap Borrower Claims  
6 Trust's Objection to Proofs of Claim Filed by Gregory C. Morse  
7 Pursuant to Section 502(b) of the Bankruptcy Code and  
8 Bankruptcy Rule 3007, filed by Norman Scott Rosenbaum on behalf  
9 of ResCap Borrower Claims Trust

10

11 (CC: Doc# 6778) Hearing re: Notice of the ResCap Borrower  
12 Claims Trust's Objection to Claim No. 4664 of James C. Jackson

13

14 (CC: Doc# 6763) Motion for Objection to Claim(s) Number 386

15

16 Doc# 6779 Notice of Objection to Claims/Notice of Objection of  
17 the ResCap Borrower Claims Trust to Claim Number 4167

18

19

20 Transcribed by: Sharona Shapiro

21 eScribers, LLC

22 700 West 192nd Street, Suite #607

23 New York, NY 10040

24 (973)406-2250

25 operations@escribers.net

1 A P P E A R A N C E S :

2 MORRISON & FOERSTER LLP

3 Attorneys for Debtors

4 250 West 55th Street

5 New York, NY 10019

6

7 BY: JORDAN A. WISHNEW, ESQ.

8 NORMAN S. ROSENBAUM, ESQ.

9

10

11 MORRISON & FOERSTER LLP

12 Attorneys for Debtors

13 425 Market Street

14 San Francisco, CA 94105

15

16 BY: ADAM A. LEWIS, ESQ.

17

18

19 DAVID F. GARBER, P.A.

20 Attorneys for Mack Creditors

21 700 Eleventh Street South

22 Suite 202

23 Naples, FL 34102

24

25 BY: DAVID F. GARBER, ESQ.

1       BRADLEY ARANT BOULT CUMMINGS LLP  
2                Attorneys for ResCap Liquidating Trust & ResCap Borrower  
3                Claims Trust  
4                One Federal Place  
5                1819 Fifth Avenue North  
6                Birmingham, AL 35203

7  
8       BY:    PRESTON H. NEEL, ESQ. (TELEPHONICALLY)  
9               JOHN W. SMITH T, ESQ. (TELEPHONICALLY)

10  
11  
12       KIRKLAND & ELLIS LLP  
13               Attorneys for Ally Financial and Ally Bank  
14               300 North LaSalle  
15               Chicago, IL 60654

16  
17       BY:    JUSTIN R. BERNBROCK, ESQ.

18  
19  
20       KIRKLAND & ELLIS LLP  
21               Attorneys for Ally Financial and Ally Bank  
22               655 Fifteenth Street, N.W.  
23               Washington, DC 20005

24  
25       BY:    JUDSON D. BROWN, ESQ.

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1 P R O C E E D I N G S

2 THE COURT: All right, please be seated. We're here  
3 in Residential Capital, number 12-12020.

4 Mr. Wishnew?

5 MR. WISHNEW: Good morning, Your Honor. Jordan  
6 Wishnew, Morrison & Foerster, for the ResCap Borrower Claims  
7 Trust.

8 Your Honor, the first matter going forward this  
9 morning is on page 4, item 1: Ally Financial's motion for an  
10 order enforcing the Chapter --

11 THE COURT: Actually, what I'd like to do,  
12 Mr. Wishnew, because I think we can deal with it quickly --

13 MR. WISHNEW: Sure.

14 THE COURT: -- I'd first like to hear the ResCap  
15 Borrower Trust -- Claims Trust objection, the proofs of claim  
16 filed by Gregory C. Morse.

17 MR. WISHNEW: Okay. For that, Your Honor, I will --

18 THE COURT: Where is that on the agenda that --

19 MR. WISHNEW: That item, Your Honor, is item number 1  
20 on page 4, under Claims Objections.

21 THE COURT: Okay.

22 MR. WISHNEW: And I will turn over the podium to my  
23 colleague, Adam Lewis.

24 THE COURT: All right. Mr. Lewis. Now, let me ask;  
25 as I understand --

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1                   Mr. Morse, are you on the telephone?

2                   Mr. Morse, you're not in the court.

3                   All right, Mr. Lewis, I previously entered an order in  
4 connection with this claims objection in response to  
5 Mr. Morse's motion to adjourn the hearing; I denied that motion  
6 to adjourn the hearing. And I won't recite the whole order,  
7 but I indicated that if he did not appear by telephone that the  
8 Court would take the matter under submission on the papers,  
9 without hearing argument from the Borrower Claims Trust, and  
10 that is what I'm going to do. So --

11                  MR. LEWIS: Very well, Your Honor. Thank you.

12                  THE COURT: -- you do not need to argue, and we're  
13 all -- thank you very much.

14                  MR. LEWIS: For the record, Adam Lewis for the ResCap  
15 Borrower Claims Trust.

16                  THE COURT: Thank you very much.

17                  Okay, Mr. Wishnew.

18                  MR. WISHNEW: Going back to the agenda, Your Honor,  
19 number 1 on page 4 is Ally Financial's motion for an order  
20 enforcing a plan injunction. I will turn the podium over to  
21 counsel for Ally Financial --

22                  THE COURT: All right.

23                  MR. WISHNEW: -- to address that matter.

24                  THE COURT: Thank you.

25                  MR. BROWN: Good morning, Your Honor. Judson Brown

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1 from Kirkland & Ellis, on behalf of Ally.

2 Your Honor, we're here today on an uncontested motion  
3 to enforce this Court's confirmation order. We've laid out the  
4 complaint issues and the basis for the relief we seek, in our  
5 papers.

6 THE COURT: Mr. Brown, just, I left one memo on my  
7 desk. Just give me --

8 Everybody stay seated. I'll be right back.

9 MR. BROWN: Absolutely.

10 (Pause)

11 THE COURT: Okay.

12 MR. BROWN: So, thank you, Your Honor. As I said,  
13 we've laid out the basis for the relief we seek, in the papers.  
14 Happy to address any issue you want, Your Honor. I don't  
15 believe --

16 THE COURT: Is anyone appearing for the responding  
17 party with respect to Ally's motion to enforce the Chapter 11  
18 plan injunction?

19 No.

20 What I would like you to go over for me is service;  
21 service of the papers. I want to be sure that it was properly  
22 served.

23 MR. BROWN: Absolutely, Your Honor. Let me walk  
24 through all of the service, just so the record's clear. The  
25 law firm representing the plaintiffs here was served with

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1 notice of the bankruptcy filing; that's at ECF 336. That firm  
2 was also served with notice of the deadline for filing a proof  
3 of claim; that's at ECF 1412. In fact, they actually filed a  
4 proof of claim and then amended proof of claim that Your Honor  
5 adjudicated earlier this year. The firm was also served with  
6 notice of the disclosure statement, the confirmation hearing,  
7 the objection deadline; that's at ECF 5196. They were also  
8 served with notice of the confirmation order, Your Honor;  
9 that's at ECF 6187. All of these are in our papers as well,  
10 Your Honor.

11 Following that confirmation order, Ally, as has been  
12 its practice in other lawsuits like this, tried to resolve the  
13 matter without coming to court, Your Honor. And we sent the  
14 firm numerous letters, e-mails, and reached out via phone  
15 numerous times; I'll walk through those briefly for the Court.  
16 On January 30, 2014, Ally's counsel in the underlying lawsuit  
17 sent a letter to the plaintiffs' firm here, articulating the  
18 basis for the firm to dismiss its claims against Ally with  
19 prejudice, pointing to the third-party release and the  
20 injunction and the confirmation order.

21 Hearing no response to that letter, Ally's counsel in  
22 this case --

23 THE COURT: The counsel's Brookstone Law Group (sic),  
24 is it?

25 MR. BROWN: That's the plaintiffs' firm, Your Honor,

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1 yes.

2 THE COURT: All right, go ahead.

3 MR. BROWN: An individual there is taking the lead for  
4 them; I think it's Mr. Vito Torchia. I've talked -- spoken to  
5 Mr. Torchia once; traded a voicemail with him two times.

6 THE COURT: Okay.

7 MR. BROWN: I'm not aware of anyone else there  
8 handling the case.

9 Mr. Torchia and the Brookstone firm did not respond to  
10 the January 30 letter from Ally's counsel in the underlying  
11 case, so Kirkland & Ellis sent Mr. Torchia a letter on February  
12 24, to which Mr. Torchia actually responded -- called me  
13 actually, Your Honor -- and said, you know what, I need to talk  
14 to my bankruptcy colleagues. We said, that's fine, talk to  
15 your bankruptcy colleagues. He never got back to us. So we  
16 followed up on March 19th; again never heard anything. We  
17 followed up with another letter on April 24; didn't hear  
18 anything immediately, so Ally filed their motion on April 25,  
19 the following day, Your Honor, and served that via e-mail. In  
20 this case we didn't have a pro se plaintiff, so we didn't do  
21 any more formal notice than that. I do know, however --

22 THE COURT: What, there're sixty-one plaintiffs in the  
23 California state-court action?

24 MR. BROWN: Honestly, Your Honor, it changes with  
25 every complaint. Right now I think that that's correct; I

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1 think it's sixty-one.

2 THE COURT: Started out with a smaller number and then  
3 additional --

4 MR. BROWN: Then it got bigger.

5 THE COURT: -- parties appeared. And I don't think --

6 MR. BROWN: That's right.

7 THE COURT: I think the last I saw, I think there were  
8 sixty-one --

9 MR. BROWN: I think that's right, Your Honor.

10 THE COURT: -- all represented by Brookstone.

11 MR. BROWN: That's correct, Your Honor, although I  
12 will admit, according to Ally's counsel in the underlying case,  
13 a number of those plaintiffs apparently didn't even know they  
14 were represented by Brookstone. They reached out to Ally's  
15 counsel and were confused as to who their lawyer was. But our  
16 understanding is they're all represented by Brookstone; there's  
17 no other law firm representing the plaintiffs in the case.

18 Following the April 24 letter from Kirkland to  
19 Mr. Torchia, and then the April 25 motion, Mr. Torchia reached  
20 out to me the following Monday -- I think that was April 28th,  
21 Your Honor -- and indicated that his clients were going to  
22 dismiss their claims with prejudice. We thought that was a  
23 great development. But nothing happened.

24 A few days later, May 1, we reached out to Mr. Torchia  
25 again, this time via e-mail, indicated, look, if you're going

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1 to dismiss your claims, that's great, we'll take the motion off  
2 the bankruptcy court calendar, but if you haven't dismissed  
3 your claims, we're going to have to go forward with our motion.  
4 That was on May 1, Your Honor. We never heard from the  
5 plaintiffs' firm.

6 A number of phone calls later, e-mails later, still  
7 haven't heard from Mr. Torchia; he never contested the motion.  
8 My understanding is no one from Brookstone or on behalf of the  
9 plaintiffs is here or on the phone today, Your Honor.

10 THE COURT: So the case was filed in state court -

11 MR. BROWN: It was, Your Honor.

12 THE COURT: -- in California. In which county? Do  
13 you know? Do you -- because I know it was removed to federal  
14 court.

15 MR. BROWN: Yeah, so, Your Honor, it's --

16 Okay, thank you.

17 They started off with a lawsuit against debtor  
18 entities and Ally --

19 THE COURT: Right.

20 MR. BROWN: -- filed a first amended complaint against  
21 those same entities, bringing effectively the same claims; then  
22 filed a proof of claim in this court, pursued that proof of  
23 claim in this court and, in January of 2013, dismissed their  
24 claims --

25 THE COURT: Yeah, when it initially came on for

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1 hearing on the objection, there was a late-filed response. I  
2 wound up scheduling -- setting out a schedule for further  
3 proceedings, and then they ultimately didn't --

4 MR. BROWN: That's right.

5 THE COURT: -- respond to that.

6 MR. BROWN: That's right, Your Honor. But meanwhile,  
7 they had dismissed their claims in California court, the  
8 federal action, after it had been removed. But then in  
9 November of 2013 they filed a complaint in Los Angeles County  
10 against nondebtor entities Ally, Ally Bank. The complaint --  
11 it is Exhibit 4 to the declaration attached to our motion, Your  
12 Honor; the November 2013 complaint against Ally and Ally Bank  
13 also identifies a number of debtor entities; doesn't bring  
14 direct claims --

15 THE COURT: Right.

16 MR. BROWN: -- against them; frankly, reserves the  
17 right to do so; but acknowledges, by its own terms, that those  
18 various debtor entities -- Homecomings, GMAC Mortgage -- were  
19 the originators of the loans at issue. And it is that November  
20 2013 complaint, Your Honor, that is still live in Los  
21 Angeles --

22 THE COURT: But --

23 MR. BROWN: -- County.

24 THE COURT: -- that's in state court?

25 MR. BROWN: It is, Your Honor.

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1           THE COURT: Is it before a specific judge?

2           MR. BROWN: Your Honor, I'll admit, I do not know  
3 whether it is appointed to a specific judge; I don't know how  
4 California and Los Angeles County works with respect to that.  
5 And for this one, Your Honor, we don't have our local counsel  
6 here, and I don't believe she's on the phone either.

7           THE COURT: Okay.

8           MR. BROWN: Based on the complaint, it doesn't look  
9 like it's been assigned to a particular judge, though, but I  
10 can't state for certain, Your Honor.

11           THE COURT: Okay, and the current complaint was filed  
12 on what date in California Superior Court?

13           MR. BROWN: November 14, 2013.

14           THE COURT: Okay. So it's before the plan was  
15 confirmed and then, of course, became effective December  
16 17th --

17           MR. BROWN: That's correct.

18           THE COURT: -- 2013?

19           MR. BROWN: That's correct, Your Honor.

20           THE COURT: All right.

21           MR. BROWN: And as I stated before, Your Honor, the  
22 plaintiffs' firm had notice of a disclosure statement, the  
23 plan, the opportunity to object; nonetheless filed this  
24 complaint; never objected to the third-party release. And then  
25 in December, Your Honor approved the plan and confirmed the

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1 plan through the confirmation order, which the plaintiffs' firm  
2 here received notice of.

3 THE COURT: Okay. Not that you were required to do  
4 so, but I just inquire whether you sent the firm copies of the  
5 written opinions that I've already rendered enforcing the  
6 third-party release against Ally.

7 MR. BROWN: We did, Your Honor. We did. Let me make  
8 sure, but I believe it was our April 24 letter, Your Honor.

9 Yes, Your Honor.

10 We, as you well know, have been in front of you three  
11 times now. We actually had to go forward on two motions  
12 against pro se plaintiffs; Your Honor entered orders as to each  
13 of those. We sent both of those on April 24 to the plaintiffs'  
14 firm in this case. In a third instance, a plaintiffs' firm had  
15 three class-action lawsuits against Ally; we filed a motion  
16 but, thankfully, we were able to resolve that before coming  
17 before Your Honor to enforce our motion. And Your Honor  
18 so-ordered the stipulation that we reached with the plaintiffs'  
19 firm in that case. We sent all three of those to the  
20 Brookstone firm in this case on April 24, so he received a  
21 notice of Your Honor's rulings -- your prior rulings.

22 THE COURT: Okay. You seek to recover attorney's fees  
23 in connection with the motion. I'd like to hear your argument  
24 about the statutory or rule basis for the award of sanctions  
25 and whether it should be against the law firm or against the

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1 claimants -- the plaintiffs in the action.

2 MR. BROWN: Yeah, Your Honor, to start out, the  
3 confirmation order and the injunction contained in that  
4 confirmation order gives Ally clear right to its fees and  
5 costs, and that's what we're seeking here. And we think that,  
6 Your Honor, the appropriate basis is fees and costs as to the  
7 plaintiffs' firm or their conduct forcing Ally to go through  
8 the process of being here before Your Honor --

9 THE COURT: Okay --

10 MR. BROWN: -- not the individual plaintiffs.

11 THE COURT: -- and is there a statutory or rule basis  
12 for what you're seeking under 28 U.S.C. 1927? Do I understand  
13 that? Or what's -- I'd like to know the specific statutory or  
14 rule basis for the award of attorney's fees and costs in  
15 connection with this motion.

16 MR. BROWN: I think it's Section 105, Your Honor.  
17 That's between the confirmation order and the terms of the  
18 order and the powers invested in this Court, through Section  
19 105. That's the basis for the fees and costs that Ally seeks,  
20 Your Honor.

21 Your Honor, we fully recognize that the plaintiffs'  
22 firm is not present, but we do feel strongly that Ally is  
23 entitled to its fees and costs under the terms of the plan that  
24 your order entered. And the plaintiffs' firm here has had  
25 clear notice for, frankly, six months at this point, Your

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1 Honor, of the terms of the third-party release and the  
2 injunction and, nonetheless, have refused for six months to  
3 discuss their claims with prejudice. Frankly, they haven't  
4 even engaged on a discussion of why their claims may not be  
5 covered by the third-party release, and it's that very conduct  
6 that, pursuant to the terms of your order and the inherent  
7 powers vested in the Court in 105, warrant fees and costs here,  
8 Your Honor.

9 THE COURT: Well, I'm not familiar with case law that  
10 supports the award of sanctions under Section 105. Certainly  
11 under --

12 MR. BROWN: So, Your Honor, we cite --

13 THE COURT: -- 9011 or Section 1927 --

14 MR. BROWN: So, Your Honor, I stand corrected. We  
15 cite three cases, two of which award sanctions under 1927, one  
16 of which under Section 105; it is an SDNY case, Your Honor,  
17 from 2002, granting sanctions pursuant to 105. And so through  
18 either vehicle, we view there to be a basis for the Court to  
19 award sanctions.

20 Your Honor, in addition to fees and costs, which  
21 certainly would -- the reasonable amount will be determined by  
22 Your Honor -- the plaintiffs' firm here -- I don't want to call  
23 it an advertisement, but they, on their Web site, are  
24 effectively touting their claims against my client. And they  
25 have included on their Web site our logos and marks and --

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1           THE COURT: I'm not sanctioning them for having a Web  
2 site that touts their claims against your client.

3           MR. BROWN: Your Honor, I'm not --

4           THE COURT: The issue before me is whether -- with  
5 respect to the complaint that's on file in state court in Los  
6 Angeles and their refusal to dismiss it, whether they have  
7 violated the terms of the injunction. I'm not getting into  
8 whatever First Amendment rights or any other rights they might  
9 have to post advertisements, true, false or otherwise.

10          MR. BROWN: Your Honor, and we're not asking you to  
11 sanction them for that conduct. What I was actually going to  
12 request, Your Honor, is, if you do order them to dismiss their  
13 claim, with that, I think Your Honor could rightfully, if you  
14 so chose, order them to remove the Ally mark or Ally logos from  
15 their Web site. But --

16          THE COURT: I --

17          MR. BROWN: -- I'll leave that to Your Honor.

18          THE COURT: If you have a trademark or copyright or  
19 false-advertising claim that you wish to assert against  
20 Brookstone, it isn't going to be before me.

21          MR. BROWN: For sure, Your Honor.

22          THE COURT: Okay. What I am going to do for now --  
23 I'm taking the matter under submission, but I'm going to enter  
24 an order today. How much time do you want to submit time  
25 records establishing how much you're seeking in attorney's fees

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1 and costs in connection with making of a motion? I mean,  
2 because what I'm going to do is I'm going to give you -- you  
3 tell me how much time you want. I'm going to give them seven  
4 days to respond to that. I'm going to require that you serve  
5 the order on them and file a proof of service that you served  
6 an order on -- you served a copy of the order on them. And  
7 after I -- I'm going to take the whole issue of whether to  
8 enter an order enforcing the injunction, as I've done in three  
9 other cases -- or two or three other cases so far. And the  
10 relief I've provided in those cases was to set a deadline for  
11 those other matters to be dismissed against Ally. And if I  
12 grant relief, it would be along those lines.

13 But in the past you haven't sought attorney's fees,  
14 and I think that was proper that you did not. This I think is  
15 a more brazen instance, so I still have to decide whether the  
16 circumstances are such that I should enter an order enforcing  
17 the injunction and then, of course, deciding whether to award  
18 fees and costs. But I'm not going to award fees and costs  
19 without having a declaration with supporting information about  
20 the fees and costs incurred and to give them a short time to  
21 respond to that.

22 I had a question, though. Maybe not. I guess not.

23 How much time do you want, Mr. Brown?

24 MR. BROWN: Your Honor, I think within seven days we  
25 can --

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1                   THE COURT: Okay.

2                   MR. BROWN: -- compile our records and submit --

3                   THE COURT: All right.

4                   MR. BROWN: -- a declaration.

5                   THE COURT: So I'm going to enter a short order today  
6 that says this matter was heard, opposing party did not appear  
7 in person or by telephone, the Court took under submission the  
8 issue of whether to enter an order enforcing the Chapter 11  
9 plan injunction and directing Ally's counsel to submit, within  
10 seven days from the date of the order, a declaration and  
11 supporting information detailing the amount of fees and costs  
12 that it seeks to recover in connection with the making of the  
13 motion, and providing Brookstone Law with seven days to file a  
14 response. I will then resolve the matter without any further  
15 hearing, based on the papers before me. Okay?

16                   MR. BROWN: Thank you, Your Honor.

17                   THE COURT: Thank you very much, Mr. Brown.

18                   MR. BROWN: Your Honor, those are all the matters that  
19 Ally had.

20                   THE COURT: Okay.

21                   MR. BROWN: May we be excused, Your Honor?

22                   THE COURT: Absolutely.

23                   MR. BROWN: Thank you, Your Honor.

24                   THE COURT: Mr. Wishnew?

25                   MR. WISHNEW: Thank you, Your Honor. The next matter

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1 on the calendar is a contested claims objection matter, matter  
2 number 2 on page 4 of the agenda: ResCap Borrower Claims Trust  
3 objection to proof of claim number 386, filed by Barry and  
4 Cheryl Mack. And I'll again defer the podium to my colleague,  
5 Adam Lewis.

6 THE COURT: Thank you.

7 Is anybody here for Barry and Cheryl Mack?

8 MR. GARBER: Your Honor, David Garber from the State  
9 of Florida, on behalf of Barry and Cheryl Mack.

10 THE COURT: Thank you. Nice to have you here,  
11 Mr. Garber.

12 MR. GARBER: Thank you.

13 THE COURT: Go ahead, Mr. Lewis.

14 MR. LEWIS: Good morning, Your Honor. Adam Lewis of  
15 Morrison & Foerster, for the ResCap Borrower Claims Trust. And  
16 I think on the line is John W. Smith T from Bradley Arant Boult  
17 & (sic) Cummings.

18 THE COURT: Okay.

19 MR. LEWIS: They were our local counsel.

20 THE COURT: Yes, and I was asked if I would permit him  
21 to appear by telephone, and I agreed that they could.

22 MR. LEWIS: And we appreciate that, Your Honor.

23 Your Honor, this is a case in which essentially what's  
24 going on is the plaintiffs -- now the plaintiff -- recovered in  
25 a lawsuit in Florida for the events that they describe. We

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1 don't deny those events occurred, although we have questions  
2 about some of the --

3 THE COURT: Not one of the prettier pictures I've --

4 MR. LEWIS: Not at all, Your Honor.

5 THE COURT: -- seen in this whole case.

6 MR. LEWIS: Not at all. But I guess local counsel  
7 there was busy doing the same thing in a lot of situations,  
8 unfortunately.

9 THE COURT: If he was doing the same thing, I hope he  
10 doesn't still have a license to practice law.

11 MR. LEWIS: I think he's in a lot of trouble in  
12 Florida, Your Honor. But the fact is we chose him, and he --

13 THE COURT: Yep.

14 MR. LEWIS: -- did what he did. And we --

15 THE COURT: He was on your watch --

16 MR. LEWIS: And we made the --

17 THE COURT: -- not you personally, Mr. Lewis --

18 MR. LEWIS: Yes.

19 THE COURT: -- obviously.

20 MR. LEWIS: Yes, Your Honor. And we made the decision  
21 to initiate the foreclosure, but I want to emphasize we also  
22 quickly tried to reverse that, and that didn't happen without  
23 our knowledge. But the plaintiffs, in their counterclaim,  
24 ultimately recovered, after an evidentiary hearing, on their  
25 claims arising out of that conduct in those events. And what's

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1 going on now essentially is they're trying to recover a second  
2 time. The first time they recovered from Deutsche Bank, which  
3 was the trustee on the bonds, and not GMAC Mortgage, LLC --  
4 GMACM -- which was the servicer and is our client here, which  
5 actually initiated the foreclosure. Deutsche Bank had no clue  
6 what was going on, as far as I know; it has now, of course.

7 But really, Deutsche Bank's liability is --

8 THE COURT: Who paid the judgment?

9 MR. LEWIS: Pardon me?

10 THE COURT: Who paid the judgment?

11 MR. LEWIS: A surety paid the judgment, Your Honor.

12 So when there was an appeal of the judgment, a bond was posted  
13 with a surety, and then the surety ultimately paid the judgment  
14 in -- I think it was March of last year. So the judgment is  
15 paid. I don't quite know what's going on, if anything, between  
16 the surety and Deutsche Bank, or Deutsche Bank and GMACM, but  
17 the fact is the judgment was paid.

18 THE COURT: Steiner was the name of the lawyer? Is  
19 that --

20 MR. LEWIS: Pardon me?

21 THE COURT: Steiner was the name of the lawyer, I  
22 think?

23 MR. LEWIS: Stern.

24 THE COURT: Stern. Excuse me.

25 MR. LEWIS: David Stern.

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23

1           THE COURT: I'm sorry.

2           MR. LEWIS: Yes.

3           THE COURT: Yeah.

4           MR. LEWIS: Other labels may apply, but that's his  
5 name.

6           THE COURT: Okay.

7           MR. LEWIS: So the judgment's been paid. And the  
8 litigation below was really about wrongful commencement of the  
9 foreclosure, and the aftermath, the fallout. And it's clear  
10 that Deutsche Bank's liability was completely depending on what  
11 GMAC did. Deutsche Bank's conduct was totally innocent and yet  
12 it ended up paying a judgment. Now what's happening is that  
13 the plaintiff --

14           THE COURT: Well, they were chargeable with conduct of  
15 their agent.

16           MR. LEWIS: Yeah, agent -- joint tortfeasor, if you  
17 will. I mean, that's one of the theories that we saw in the  
18 response here. But I don't think it matters, because in all  
19 those instances the liability is derivative and, when one pays,  
20 that's the end of it. And there's case law that we cite  
21 repeatedly, both in the opening objection and in our reply, to  
22 that effect.

23           The only real issue on the res judicata question -- I  
24 mean the issues are, you know, is it the same thing sued for,  
25 and the answer is yes; it's money. That's what Florida looks

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1 at, not what kind of money or what kind of theory the money is  
2 sought under, but whether it's money or some other kind of  
3 relief. The answer clearly is it was money.

4 THE COURT: Well, and I'm going to ask Mr. Garber  
5 about this as well; so this claim asserts a wrongful-death  
6 claim for Mrs. Mack's unfortunate death, whether any of the  
7 defendants were responsible for it or not. I mean, it's not a  
8 pretty picture; let's put it that way, okay? The original  
9 award -- I guess it was in state court?

10 MR. LEWIS: Yes, Your Honor.

11 THE COURT: The original award in state court, while  
12 Mrs. Mack was still alive, included, what, 150,000 dollars  
13 for -- attributable to what, personal injury, emotional  
14 distress. And that portion of the judgment was reversed -- was  
15 vacated. The judgment was reduced by -- and one of you will  
16 correct me; I thought that that 150,000-dollar award was on the  
17 RESPA claim.

18 MR. LEWIS: It was.

19 THE COURT: And I thought that the court determined  
20 that such damages are not recoverable under RESPA.

21 MR. LEWIS: That's correct.

22 THE COURT: And in fact, because there had been no  
23 violation of RESPA, because GMAC always was the servicer -- the  
24 note had transferred but the servicer remained the same. So  
25 the RESPA award was vacated, is that --

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1 MR. LEWIS: That's correct, Your Honor.

2 THE COURT: Okay.

3 MR. LEWIS: But I think -- if I can anticipate what I  
4 think the Court's getting at, the fact is they could have sued  
5 for emotional damages for the other conduct. And whether they  
6 did or not, the fact is that's what res judicata is all about;  
7 one suit on the underlying nucleus of facts, so we don't have  
8 to keep coming back to court again and again and again, taking  
9 new bites of the apple, revising and refitting our theories  
10 because the last one didn't work. That's what this is all --  
11 that's what res judicata is all about, and that fits like a  
12 glove here, Your Honor. This is a claim --

13 THE COURT: If -- I'm not saying you're wrong, but the  
14 wrinkle, from my standpoint, is that GMAC wasn't a defendant;  
15 Deutsche Bank was the defendant.

16 So let me ask you, hypothetically, if GMAC committed  
17 conduct that could, under some theory, give rise to a wrongful-  
18 death claim, and that conduct wasn't chargeable to Deutsche  
19 Bank, would this claim withstand your res judicata objection?  
20 Look, if GMAC had been a party in the underlying action, it  
21 fits squarely -- you know, how many decisions on res judicata  
22 have I already written in ResCap? A lot. And if it's a claim  
23 that was or could have been asserted, it's barred, okay? Here  
24 the wrinkle is GMAC wasn't a party.

25 I know your argument that the only basis for liability

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1 of Deutsche Bank was because GMAC was its agent. But that's  
2 what I'm -- that's where I'm focusing, okay? Is there some --  
3 does a wrongful-death claim now, against -- assuming it was  
4 timely and not barred by a statute of limitations or anything  
5 like that -- a personal-injury claim was tacked onto the RESPA  
6 claim against Deutsche Bank, and that gets vacated, is there a  
7 separate basis -- have they at least alleged a separate basis  
8 that would support a wrongful-death claim for Mrs. Mack's  
9 demise against GMAC?

10 MR. LEWIS: Your Honor, my understanding of the  
11 doctrine of res judicata, and particularly the last two  
12 elements that are applicable in Florida, is that it's not  
13 whether you allege something; it's whether you could have  
14 alleged it. And so the question becomes --

15 THE COURT: Well, clearly, if GMAC had been in there,  
16 I --

17 MR. LEWIS: No, it --

18 THE COURT: -- crystal clear.

19 MR. LEWIS: My point is if it could have been alleged  
20 against the party who is your privy -- and that's our  
21 argument -- whether it was alleged or not doesn't matter. So  
22 the question, I believe, is: Could the Macks have made this  
23 claim against Deutsche Bank? And I don't see why not. I mean,  
24 we've seen the law that says that they couldn't have. And  
25 everything else that Deutsche Bank didn't do, but GMAC did,

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1 Deutsche Bank was held liable for and sued for. I don't see  
2 why it would be any different with a wrongful-death action than  
3 anything else.

4 THE COURT: Okay.

5 MR. LEWIS: And that's the basic point. So if you  
6 believe -- if you agree with us that res judicata's basic  
7 principles, with respect to privity, quality of person  
8 identity, and all that, apply, it applies just as much.

9 It's -- the same thing too, Your Honor, is true of the  
10 new RESPA 2605(e) claim about, you know, they weren't  
11 responsive. It's true that that couldn't have been made  
12 against Deutsche Bank, on a direct basis, because it can only  
13 be made -- it's only the receiver's -- it's only GMAC's conduct  
14 that could be at issue. But that doesn't mean it couldn't --  
15 they couldn't have sued Deutsche Bank for the same thing. They  
16 didn't.

17 And from our perspective, a 2605(e) claim under RESPA  
18 is barred for the same reason. So I think the RESPA claim,  
19 2605(e), and the wrongful-death claim both are claims that I  
20 have seen nothing that says couldn't have been alleged against  
21 Deutsche Bank, even though it was totally innocent of the  
22 conduct involved. In fact, it was totally innocent of all the  
23 conduct involved for which it was held liable. And I think  
24 that's the key to the res judicata argument.

25 THE COURT: Just give me a second.

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1 MR. LEWIS: Sure.

2 THE COURT: I want to see if I have other questions  
3 for you.

4 (Pause)

5 THE COURT: Okay.

6 MR. LEWIS: So Your Honor, we think that res  
7 judicata's all four elements apply here. The fundamental issue  
8 for the third and fourth elements is, essentially, were the  
9 interests closely enough tied, between GMAC and Deutsche Bank,  
10 for Deutsche Bank's -- the judgment against Deutsche Bank to  
11 apply as res judicata with respect to GMAC -- and we think --  
12 you know, however you look at it, whether it's respondeat  
13 superior, the court having found that Deutsche Bank was the  
14 agent, or whether it's -- I mean, GMAC was the agent, or  
15 whether it's joint tortfeasors, the same rules apply; it's  
16 whether the interests are sufficiently intertwined for the  
17 defense of the one to be applicable to the other. And clearly  
18 they were, because Deutsche Bank was innocent of all the  
19 wrongdoing, so it had every reason to defend GMAC's conduct.  
20 Now, in fact, it didn't get much of a chance to do that, but  
21 that's not the test here.

22 THE COURT: Just because the lawyer --

23 MR. LEWIS: Yeah.

24 THE COURT: -- GMAC hired to --

25 MR. LEWIS: Right. Yeah, that's right. Yeah, I mean,

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1 that's right.

2           But that's the key, and whatever label you apply, the  
3 fact is that the Macks tried to hold Deutsche Bank liable for,  
4 exclusively, GMAC's conduct, and succeeded on some of their  
5 theories.

6           THE COURT: All right. Let me hear from Mr. Garber.

7           MR. LEWIS: Thank you, Your Honor.

8           THE COURT: Thank you, Mr. Lewis.

9           Mr. Garber?

10          MR. GARBER: Your Honor, if it pleases the Court.

11          David Garber on behalf of Barry and Cheryl Mack.

12          I understand the Court's time is limited. This is a  
13 long case that's been going on for five years.

14          THE COURT: This is an important matter for me; you've  
15 got as much time as you -- within limits, you have as much  
16 time --

17          MR. GARBER: Okay.

18          THE COURT: -- as you want, okay?

19          MR. GARBER: Let me briefly go over the facts, because  
20 I think this case will be decided on the facts of this  
21 particular thing. In the summer of 2009, my clients were  
22 experiencing some financial difficulty. They contacted GMAC,  
23 to whom they had been making their mortgage payments, because  
24 they were notified in 2006, soon after they took out their  
25 loan, that GMAC was the person they had to pay for it. And in

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1 fact, GMAC -- GMAC Mortgage was the owner and the servicer of  
2 the note. My clients were making those payments, but they were  
3 making them out of savings. They had savings of about 2- or  
4 300,000 dollars when they started. They were drawing it down.  
5 It was maybe 86,000 when they realized that they had to do  
6 something.

7 On April 17th, they called up GMAC to ask if there was  
8 some government program like HAMP to help them, and GMAC said  
9 yes there was. On the notes that have, since the suit, been  
10 given to us, in the post-judgment proceedings, we found out  
11 that on April 17th, GMAC found my clients to be directed  
12 towards foreclosure, on the same day that they called. Now, my  
13 clients, of course, knew none of this inner working. In August  
14 they were served with a suit by Deutsche Bank. They had never  
15 had anything to do with Deutsche Bank; they didn't know who  
16 Deutsche Bank was. First thing they did was call up GMAC, to  
17 whom they had been talking to for years.

18 THE COURT: Just pull the microphone closer.

19 MR. GARBER: Yes.

20 THE COURT: I just want -- I hear you fine; I just  
21 want to make sure we're getting a clear record, okay? Go  
22 ahead.

23 MR. GARBER: I understand. So the first thing they  
24 did was call GMAC, and they talked to GMAC. GMAC told them  
25 there's no problem here, you're not in default, there's nothing

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1 wrong, don't pay any attention to this lawsuit. But the  
2 lawsuit stayed.

3 And they came to an attorney, and when I read the  
4 complaint, I saw the complaint said that Deutsche Bank was the  
5 owner of this loan and was going to record an assignment  
6 showing that they had bought the loan. And so the theory that  
7 we operated on was that GMAC had sold the loan to Deutsche  
8 Bank. But not having been notified, the Macks continued to pay  
9 GMAC, who got all the money. Deutsche Bank didn't get any  
10 money, because they never notified the Macks, as they would  
11 have been required to do under RESPA, that they should now get  
12 the payments.

13 That was the basis on the counter-claim. It was  
14 divided into two parts: number one, under Florida law, was  
15 slander of title. Slander of title is when you record a  
16 instrument or take some action to disparage a person's property  
17 so that its value has been reduced. It is somewhat different  
18 than the slander that we're normally used to in the law,  
19 because --

20 THE COURT: I've had quite a few slander of title  
21 matters in connection with ResCap, so I'm familiar with it.

22 MR. GARBER: And the distinguishing factor that I want  
23 to bring up here is that there's only one type of damages,  
24 special damages, not general damages. You don't get personal-  
25 injury damages; you don't get anything except you show how much

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1 that property was damaged in its value.

2 THE COURT: On the slander of title?

3 MR. GARBER: On the slander of title. So that was  
4 count I. Count II they filed was under RESPA. RESPA was under  
5 that section of RESPA that says that when a servicer is  
6 handling a loan, when it sells the loan, it's got to notify the  
7 borrowers within fifteen days of the transfer so that the  
8 payments can all be made properly. And there was never any  
9 notice on that. Deutsche Bank, as the new responsible bank, as  
10 they indicated they were on their suit that was filed by Mr.  
11 Stern, had filed this improperly, because in fact the Macks had  
12 made the payments. And so they would have been liable under  
13 RESPA. And that was pled, in some detail, in the suit.

14 The suit was dismissed as to the foreclosure in  
15 December, some three months later. It was dismissed by Mr.  
16 Stern. Mr. Stern handles many cases down there; he's been a  
17 lot of trouble on a lot of cases. But he did not dismiss it  
18 until December. He had a right to do so, under Florida law, to  
19 dismiss his claim. He could not dismiss the counter-claim, but  
20 he could dismiss his claim. He declared that his client,  
21 Deutsche Bank, was the prevailing party, they were entitled to  
22 fees and costs, and they were leaving that open but the claim  
23 itself was dismissed.

24 Over the course of the next eighteen months, not only  
25 my firm, but also the Court itself, made numerous attempts to

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1 get Mr. Stern to respond to the counter-claim.

2 THE COURT: Is he still practicing law?

3 MR. GARBER: I can tell you what I've heard.

4 THE COURT: Okay.

5 MR. GARBER: No. I've heard that he may live in  
6 Tahiti, that he may have six million dollars and that he's  
7 doing the best he can with a difficult situation.

8 MR. SMITH T: He's been disbarred by the Florida bar,  
9 Judge.

10 THE COURT: May I ask who's speaking?

11 MR. SMITH T: That was John Smith T for ResCap. I'm  
12 sorry.

13 THE COURT: Okay. No, that's okay.

14 MR. GARBER: Okay. And John --

15 THE COURT: I'm not surprised.

16 MR. GARBER: I did not know that, so that's new.

17 But in any case, for eighteen months, we tried to get  
18 Mr. Stern to come to court, and the judge sent out notices,  
19 notices of trials, orders to appear. Mr. Stern did none of  
20 this, and so the judge went ahead and set a trial; it was on  
21 May 5th of 2011. And the only person that appeared was the  
22 Macks -- the Macks, their attorney, the witnesses. The trial  
23 lasted perhaps four hours. Documents were submitted, testimony  
24 was taken, and they showed that, in fact, Mrs. Mack had taken  
25 an overdose of alcohol and sleeping pills in October of 2009,

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1 then she was hospitalized for two weeks, and that she suffered  
2 permanent residual kidney damage as a result of doing that.  
3 However, she was stabilized by the time of the trial.

4 And so we asked, under RESPA -- RESPA will allow  
5 personal-injury damages in some jurisdictions of the country.  
6 I think in the Ninth Circuit they don't recognize that; I  
7 believe in the Fourth Circuit they may recognize it. We  
8 informed that to the judge of the Eleventh Circuit, which is  
9 where we are. There had not been a ruling, and so the judge  
10 elected to award personal-injury damages of 150,000 dollars.

11 After the appeal time ran, which was thirty days, so  
12 it went until June 5th of 2011, the Macks, through me, began  
13 collection procedures. We sent out subpoenas, not only to  
14 Deutsche Bank, but we sent subpoenas to GMAC, because GMAC, we  
15 thought, new all about the transfer to Deutsche Bank and could  
16 tell us what assets that Deutsche Bank had. It was only in  
17 response to those collection efforts that we suddenly received  
18 a motion to vacate the judgment, and it was done under a  
19 provision of law which says that if a -- if a judge --

20 THE COURT: Filed by Deutsche Bank --

21 MR. GARBER: By --

22 THE COURT: -- because they were the party -- Deutsche  
23 Bank --

24 MR. GARBER: On behalf of Deutsche Bank.

25 There is a wrinkle here, and that is Mr. Smith T, a

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1 distinguished and able attorney, appeared on behalf, not only  
2 of Deutsche Bank, but also GMAC.

3 THE COURT: Right.

4 MR. GARBER: But GMAC was not a party. GMAC --

5 THE COURT: I understand.

6 MR. GARBER: -- did not file a motion to intervene.  
7 GMAC was never recognized as before the Court by the Court in  
8 these proceedings. But he also represented Deutsche Bank. And  
9 they had another local attorney that was there that represented  
10 only Deutsche Bank.

11 And so the Court conducted numerous hearings into  
12 this, permitted a large amount of discovery and evidence,  
13 during which we got a better picture of this relationship that  
14 existed between Deutsche Bank and GMAC. And Deutsche Bank --  
15 or GMAC, who was the active participant -- we did not hear from  
16 many witnesses from Deutsche Bank -- GMAC maintained that in  
17 fact they were the servicer, had been the servicer before,  
18 continued to be the servicer after the suit was filed; they  
19 hired Mr. Stern, they made the mistake, and so on. And they  
20 gave us numerous documents, some of which are in our brief here  
21 today.

22 Nowhere in these proceedings did the post-judgment  
23 court ever find that GMAC was an agent, or affiliated, in any  
24 way, with Deutsche Bank, because our suit, the Mack suit, was  
25 against Deutsche Bank, not in a vicarious liability, but in an

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1 active liability of having personally directed their attorney  
2 to file this lawsuit.

3 Now whether they got on the telephone and talked to  
4 him or whether they talked to somebody at GMAC and they got on  
5 the telephone and talked to him, to this day, I can't answer  
6 that question. But the lawsuit was not against him  
7 vicariously. As a matter of fact, quite to the contrary, my  
8 clients, at all times, maintained that GMAC was helpful to them  
9 in trying to work this out, and was telling them that they  
10 would try to call up Deutsche Bank to see if it could be fixed.

11 THE COURT: Little did they know that Mr. Stern wasn't  
12 paying any attention to anybody.

13 MR. GARBER: Mr. Stern wasn't paying attention to  
14 anybody.

15 So my clients would have never authorized a suit  
16 against GMAC. They were not mad against GMAC. Had they  
17 authorized a suit, had I filed it, I think that the Macks would  
18 have been subject to our equivalent -- state equivalent of your  
19 Rule 11 sanctions because there was absolutely no basis to  
20 believe that GMAC had anything to do with this whatsoever.

21 In the post-judgment proceedings that --

22 THE COURT: Well, they knew that they were sending  
23 their mortgage payments to GMAC.

24 MR. GARBER: They continued to do that.

25 THE COURT: Yeah, but they -- so they -- I mean, GMAC

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1 was not a stranger to the Macks. They --

2 MR. GARBER: Yes. Yes.

3 THE COURT: They were making their mortgage payments  
4 to GMAC, and they understood that GMAC was the loan servicer?

5 MR. GARBER: No, they did not. They continued to pay  
6 GMAC, because that's who they thought they had the deal with.  
7 They thought that Deutsche Bank was an interloper.

8 THE COURT: All right. So tell me about -- so it's in  
9 the enforcement of judgment proceeding that Deutsche Bank makes  
10 a motion to vacate a portion of the judgment? Is that --

11 MR. GARBER: Yes.

12 THE COURT: All right. And tell me about that.

13 MR. GARBER: And it was made on numerous grounds, one  
14 of which was an equitable ground that since their attorney  
15 didn't keep them informed of anything they shouldn't be held  
16 liable. And the judge, for various reasons --

17 THE COURT: That didn't take --

18 MR. GARBER: It -- it did not.

19 THE COURT: -- the judge very long to dispose of.

20 MR. GARBER: But there was also an attack made that  
21 the slander of title was not pled properly, and not having been  
22 pled properly, if it is fatally defective on the pleading, then  
23 you cannot get a judgment against them, and it must go. The  
24 judge denied that.

25 THE COURT: Right.

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1                   MR. GARBER: They also made the grounds that the RESPA  
2 claim was not pled properly. And so the judge believed that  
3 the RESPA claim was not pled properly, and he declared that to  
4 be a nullity.

5                   THE COURT: And that's how the 150,000-dollar pain and  
6 suffering went away?

7                   MR. GARBER: Yes, Your Honor, and so it went away. It  
8 was --

9                   THE COURT: And it --

10                  MR. GARBER: -- never then litigated.

11                  THE COURT: Okay. So -- well, that's not true.

12                  MR. GARBER: Well, yes --

13                  THE COURT: That's not true.

14                  MR. GARBER: -- that's a matter of interpretation.

15                  THE COURT: It was litigated, and he vacated it  
16 because, as I -- if I'm reading the papers correctly, GMAC,  
17 having been the loan servicer from the start and throughout, he  
18 concluded that there was no violation of the disclosure  
19 requirements of RESPA. It would have required notice of the  
20 change in the loan servicer but not of the owner of the note.

21 Am I right on that?

22                  MR. GARBER: Well, I think the reason that he did it  
23 was because we alleged there was a transfer from GMAC to  
24 Deutsche Bank, and we did not say that there was a transfer of  
25 servicer, because RESPA --

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1           THE COURT: Okay.

2           MR. GARBER: -- does not apply to a transfer of  
3 ownership.

4           THE COURT: Right.

5           MR. GARBER: It only applies to a transfer of  
6 servicer.

7           THE COURT: That's my point. The fact that there may  
8 have been a transfer of the ownership of the note does not --  
9 and no disclosure of that, does not give rise to a RESPA claim.  
10 RESPA relates to disclosure of who the loan servicer is.

11          MR. GARBER: That's true.

12          THE COURT: Okay.

13          MR. GARBER: But had we put the word "servicer" in  
14 there, then the Court would have had no authority, even it  
15 wasn't true -- it doesn't matter if it was true or not; it was  
16 litigated, it was decided --

17          THE COURT: So tell me what's the --

18          MR. GARBER: -- you know, the whole --

19          THE COURT: -- what is the underlying basis for your  
20 wrongful-death portion of the proof of claim here?

21          MR. GARBER: Okay. Now, during the post-judgment  
22 procedures, which went on for almost two years, Mrs. Mack  
23 experienced a crisis, in the spring of 2012, because her  
24 kidneys were shutting down. And for reasons, which I don't  
25 know and will not represent to the Court, dialysis was not

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1 effective for her. She was put into hospice, under hospice  
2 care, and she lingered until, I believe, September of 2013,  
3 when she died. The death certificate lists renal failure as a  
4 contributing cause; it does not say it's the only cause, but  
5 it's a contributing cause. So whether she died of renal  
6 failure or liver failure, I can't -- I'm not going to represent  
7 that to the Court.

8 THE COURT: Okay.

9 MR. GARBER: But it was a cause.

10 THE COURT: Um-hum.

11 MR. GARBER: That did not occur until after we had  
12 filed the proof of claim. When we filed the proof of claim,  
13 which I believe was probably in the spring of 2000 and --

14 THE COURT: I'm sure I have the date, but --

15 MR. GARBER: -- 13, maybe.

16 THE COURT: -- yeah --

17 MR. LEWIS: August 8 of 2012, Your Honor.

18 MR. GARBER: Okay. August --

19 THE COURT: It was a timely filed proof of claim.

20 MR. GARBER: Yes.

21 THE COURT: There's no issue --

22 MR. GARBER: No issue. Okay. When that was filed, of  
23 course, we didn't know if Deutsche Bank was going to be  
24 absolved of all liability, because they were trying to do it;  
25 it was still before the Court. If they were absolved of all

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1 liability, or at least the judgment knocked out, that would  
2 have then resulted in a remand; we would have had to amend our  
3 complaint, and we would have had to recognize -- if there was a  
4 relationship between Deutsche Bank and GMAC, we would have had  
5 to have recognized that.

6 And so we filed a proof of claim, recognizing fully  
7 that we may ultimately have to retry everything. Well, as it  
8 turned out, we're now precluded. We can't sue Deutsche Bank  
9 for RESPA time --

10 THE COURT: Let me ask you this.

11 MR. GARBER: Sure.

12 THE COURT: Okay. And then I'll let you go on. So if  
13 you file a personal-injury -- the plaintiff's still alive and  
14 you file a personal-injury case, you take it to judgment, you  
15 recover -- let's assume the judgment's vacated, but you take it  
16 to judgment. And your client subsequently dies, and the cause  
17 of death is related to the underlying injury that was part of  
18 your claim -- you know, personal-injury claim.

19 You don't get to file a new case -- I believe this is  
20 right. Because the plaintiff ultimately dies, after the case  
21 has been resolved by a judgment, you don't get to file a new  
22 case for wrongful death based on the same acts, events or  
23 causes that gave the underlying claims that you did try and  
24 recover on. Am I right on that? Do you agree with that?

25 MR. GARBER: I would agree with that, under Florida

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1 law, yes, Your Honor. You --

2 THE COURT: I think that's probably true everywhere.  
3 You don't -- it's unfortunate -- I'll assume for now that Mrs.  
4 Mack's death is attributable to the stress caused by everything  
5 that went on, okay? I'm not -- let me assume that for now,  
6 okay? In your claims against Deutsche Bank, and in the portion  
7 of the judgment that you recovered for personal inj -- you  
8 know, emotional distress, the 150,000 dollars that was  
9 attributable to that -- let me assume that the judge didn't  
10 vacate the RESPA award, okay? Let's assume that it remained  
11 and it was paid. Would you agree that Mr. Mack couldn't bring  
12 a wrongful-death action against Deutsche Bank when Mrs. Mack  
13 subsequently died from whatever enabled you to recover that  
14 150,000-dollar judgment in the first place. Do you agree with  
15 that?

16 MR. GARBER: I would agree that I would not be the  
17 attorney to bring that.

18 THE COURT: Well --

19 MR. GARBER: I don't think that would be proper.

20 THE COURT: Okay. All right. So why is your claim  
21 against GMAC -- why isn't it -- the fact of her death is  
22 unfortunate, and when I read these papers, it's a horrible  
23 story. I don't -- I'm glad to hear that Mr. Stern's been  
24 disbarred. Okay?

25 But where I'm having the problem is in understanding

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1 why when Deutsche Bank is held liable, as they were, and paid a  
2 judgment -- somebody paid the judgment, how -- why isn't  
3 this -- why are you trying to get a second bite at the apple  
4 for the same acts, events, et cetera, that gave rise to the  
5 claim? Would your -- if you had a good claim against GMAC, you  
6 had a good claim against Deutsche Bank. It was the principal;  
7 GMAC was the agent. Whether GMAC was a party to the action or  
8 not, you don't get to decide, um, I'm not happy with that first  
9 judgment I got; I may have been paid, but I'm not happy with  
10 it, so let me now go against the agent.

11 MR. GARBER: Okay. And that, I think, brings us to  
12 the gravamen of the objection to this claim --

13 THE COURT: It is.

14 MR. GARBER: -- here today.

15 THE COURT: It is.

16 MR. GARBER: And to address that. Under Florida law  
17 we also recognize res judicata and collateral estoppel --

18 THE COURT: And it's a given, and I think I've written  
19 enough -- you know, res judicata has come up quite often in  
20 ResCap, all right? And I have -- I don't know; I haven't tried  
21 to keep track of the number of opinions dealing specifically.  
22 And I -- because this originates from Florida, I have to apply  
23 Florida law -- the Florida rules with respect to res judicata.  
24 The trust doesn't disagree with that. So it's Florida law  
25 that's controlling on this issue.

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1                   MR. GARBER: And Your Honor, were the facts such that  
2 Deutsche Bank had been sued, in its vicarious liability as  
3 principal, for acts that actually were done by the servant --

4                   THE COURT: Does the suit have to have alleged --  
5 that's where I'm having problems, Mr. Garber. I don't think it  
6 matters one iota whether the suit alleged that we're suing  
7 Deutsche Bank for the acts of GMAC, its agent as loan servicer,  
8 for hiring Stern as the lawyer; I don't think that matters.

9                   MR. GARBER: And Your Honor, I don't know the answer  
10 to that. I can say that where we have respondeat superior  
11 situations, that we have master-servant situations --

12                   THE COURT: Sure.

13                   MR. GARBER: -- that the law in Florida is kind of  
14 over the board, and the --

15                   THE COURT: What do you mean by that?

16                   MR. GARBER: -- debtor -- well, the debtor has quoted  
17 some -- I think some pretty good cases in here. And there are  
18 a line of cases that I will -- let me see if I can get them --  
19 Atlantic Cylinder, Aerojet, Hinton; those are good cases.  
20 Those cases, though, were decided in -- most of them in 1975.  
21 Florida is divided up into five different appellate --

22                   THE COURT: Believe it or not, actually, when I was a  
23 practicing lawyer, I actually litigated in Florida in one of  
24 your appellate districts and had to struggle with looking at  
25 the appellate opinions from each of the districts, et cetera.

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1 So I had some first-hand --

2 MR. GARBER: And it does --

3 THE COURT: -- experience, not as much as you,  
4 obviously have, but I did have some first-hand experience with  
5 them.

6 MR. GARBER: It does make a difference, because were  
7 the Second DCA -- which is where I am, which is where this case  
8 came from -- were they to have a decision on point from the  
9 First DCA, all lower courts are bound to accept that First DCA  
10 opinion. Second DCA is not bound to accept it.

11 THE COURT: Right.

12 MR. GARBER: And you may have a conflict because of  
13 this. So these cases that were decided by -- or cited by GMAC,  
14 in this particular case, I think most of them came out of the  
15 First District. There is one out of the Second District, which  
16 is where I am from. I think that's the 1975 case.

17 THE COURT: You know, but what a federal court is  
18 supposed to do, where there are intermediate state appellate  
19 decisions and no -- if there's a circumstance where there's no  
20 binding decisions of the highest court of the state, it's to  
21 predict how that issue would be decided by the Florida Supreme  
22 Court, and I apply what I think is the right rule. I may be  
23 wrong; I may be right. But that's where -- you know, this  
24 issue comes up in New York from time to time. We've got  
25 different Appellate Districts; sometimes there are different

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1       rules. What a federal court, bankruptcy court or district  
2       court does is, if there's no settled law by the highest court  
3       of the state is to essentially apply the rule that it predicts  
4       would be the result, if the difference makes -- it may not make  
5       a difference, okay, on -- but that's what my understanding of  
6       what a federal court is supposed to do. I don't decide, well,  
7       this case emanated from the First District of Florida so I'll  
8       apply its rule. The rule is different in the Second District.  
9       That's not -- I don't know any case law that suggests that's  
10      what I'm supposed to do.

11            MR. GARBER: And I don't know that either. And the  
12       only reason I would suggest that would be that if this case  
13       were to be remanded to the Second District, it would be decided  
14       under Second District law.

15            THE COURT: I understand that. Until the Florida  
16       Supreme Court decided that the rule should be something  
17       otherwise.

18            MR. GARBER: Exactly, Your Honor, until they clarify  
19       the point.

20            In 1992, the Second District court issued an opinion  
21       in the case of *Mitchell v. Edge and Battaglia*, and let me see  
22       if I can outline the facts briefly. Mr. Mitchell apparently  
23       wanted something built, a building built for him. And he  
24       wanted it built by a company called G & R Builders. G & R  
25       Builders had two principals, one of which was an actual

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1 licensed builder, and the other, I guess was the financier.  
2 The property was not built properly and so he reached a  
3 settlement with G & R, the company. Mr. Battaglia, who was the  
4 financial contributor, then got into a dispute with the actual  
5 builder, who was Mr. Edge. Mr. Mitchell then sued Edge and  
6 Battaglia, individually, and it went to court. And the  
7 Court -- these defenses of res judicata were raised because  
8 they said G & R Builders was the principal; these people were  
9 the servants, and therefore a judgment against the master  
10 released the servants. That was the principle on which Edge  
11 defended. And this court -- I don't know if I gave you a copy  
12 of the case. This court --

13 THE COURT: Are you talking about Mitchell?

14 MR. GARBER: Pardon?

15 THE COURT: Mitchell?

16 MR. GARBER: Yeah, Mitchell v. Edge and Battaglia.

17 THE COURT: Yeah, I've got Mitchell.

18 MR. GARBER: Okay. This court went over to review the  
19 cases -- many of the cases cited today by GMAC in their case,  
20 and they found, on page 3 of their decision -- actually 3 of my  
21 printout --

22 THE COURT: I've read it in the Southern Reporter.

23 MR. GARBER: Okay. Okay. But if I could just  
24 briefly --

25 THE COURT: Go ahead.

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1                   MR. GARBER: -- read what they say. "Those cases also  
2 hold, citing the 'weight of authority,' that a plaintiff is  
3 barred from relitigating his claim against the second of two  
4 persons responsible for the wrong to plaintiff where the  
5 plaintiff has recovered a collectible judgment against another  
6 responsible party. The rule and its application, as stated in  
7 those cases, is contrary to the 'more modern rule' stated in  
8 Restatement (Second)" --

9                   THE COURT: Right, Section 49, comment A.

10                  MR. GARBER: Exactly, Your Honor. And you have that  
11 before you, and there is no need for me to read the rest of it  
12 to you.

13                  Now, we think that the rationale --

14                  THE COURT: But the court in Mitchell said it is "not  
15 now required to decide whether the more modern version of the  
16 rule as stated in the Restatement (Second) of Judgments is now  
17 the 'weight of authority' and should cause us to recede" from  
18 earlier holdings. That's at --

19                  MR. GARBER: Because actually --

20                  THE COURT: -- 589 So.2d at page 128.

21                  MR. GARBER: Yeah, and that's because there was an  
22 earlier court -- an earlier decision out of the second DCA as  
23 well -- I think it came out in 1969 --

24                  THE COURT: It's the Gerardi case.

25                  MR. GARBER: -- which they found justification in that

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1 case.

2 THE COURT: The Gerardi case.

3 MR. GARBER: Yes, Your Honor, exactly. Exactly. So  
4 they believed that that was sufficient enough not to have to --

5 THE COURT: Yeah, but the court there -- in Gerardi,  
6 because the judgment hadn't been satisfied, the court permitted  
7 the plaintiff to sue the joint tortfeasor. Here, the judgment  
8 was satisfied.

9 MR. GARBER: Well, that's a good point, Your Honor.  
10 That's a good point.

11 THE COURT: It's Gerardi 232 So.2d at pages 37 and 38.

12 MR. GARBER: Yes. That portion of the judgment that  
13 had to do with the --

14 THE COURT: And Gerardi --

15 MR. GARBER: -- damages to the property --

16 THE COURT: -- has been subsequently questioned by  
17 other courts in Florida. See Hinton, 317 So.2d 832; it's a  
18 1975 case.

19 MR. GARBER: Yes, it is true --

20 THE COURT: I read -- this is -- look, I don't know  
21 what I'm going to do yet on this; I'm taking it under  
22 submission. It's a troublesome case. I'm not taking this  
23 lightly at all; I want to assure you of it. But I'm immersed  
24 in the Florida jurisprudence about res judicata.

25 MR. GARBER: I understand. Can I make one other

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1 point?

2 THE COURT: Yes, you can.

3 MR. GARBER: And this is a factual point.

4 THE COURT: Go ahead.

5 MR. GARBER: There has never been a determination by  
6 any court in the state of Flor -- in my case, anyway, that GMAC  
7 was the agent of Deutsche Bank.

8 THE COURT: You're not really thinking you want to  
9 dispute that, do you?

10 MR. GARBER: Yes, Your Honor, I do. And that's the  
11 point that I want to get to. GMAC and Deutsche Bank have a  
12 very complicated relationship, and --

13 THE COURT: It's not complicated at all. It's not  
14 complicated at all. Deutsche Bank is the trustee for a  
15 securitization trust. There's a pooling and servicing  
16 agreement. There's servicing rights which GMAC held; it  
17 serviced the loan. The fact that it was securitized and in the  
18 trust -- I mean, I've been living this for a long time, Mr.  
19 Garber.

20 MR. GARBER: Yes, Your Honor, there is -- they entered  
21 into a contract, and the contract defined their relationship;  
22 they chose to do it that way. And I want to --

23 THE COURT: Do you know how many cases there are that  
24 say that a loan servicer is the agent for the principal?

25 MR. GARBER: Well, I know, contractually, they have

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1 agreed that GMAC is an independent contractor and not an agent  
2 able to bind or commit Deutsche Bank to their actions.

3 THE COURT: What --

4 MR. GARBER: And that is found in the submissions that  
5 were made on behalf of GMAC in this action, if I can briefly  
6 find -- client contract dated March 6th, 2006. And it says,  
7 under that client contract -- that is under (B)(3), page 23 of  
8 their exhibits, paragraph 9, the relationship of the parties,  
9 that is, between GMAC, who sold loans, and RFC, which was  
10 Residential Funding Corporation --

11 THE COURT: Yeah, RFC typically winds up -- puts the  
12 loans into a securitization pool, sells them to its trust; the  
13 servicing rights stay behind. GMAC, or one of the other ResCap  
14 entities services the loans, and sometimes they sell those  
15 servicing rights. When this court approved the sale to Ocwen,  
16 the balance of all the servicing rights transferred to Ocwen.  
17 That's what's happened here.

18 MR. GARBER: Exactly, and I do understand that part of  
19 it. Probably the rest of it is too complicated for me, but --

20 THE COURT: No, I'm sure not.

21 MR. GARBER: They do define their relationship as "The  
22 relationship between the client" -- the client in this case was  
23 GMAC Mortgage -- "and GMAC RFC", which is really RFC, "is  
24 limited to that of seller on the part of the client", GMAC  
25 Mortgage, "and that of buyer on the part of GMAC RFC", which is

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1 really just RFC.

2 THE COURT: That's as to the loan, not as to the  
3 servicing rights.

4 MR. GARBER: No, it goes on to say -- I think they  
5 retained for themselves when they did this. When they said,  
6 RFC, we own the loan; we'll sell it to you, but we're not  
7 selling all of it to you.

8 THE COURT: No, we're --

9 MR. GARBER: We are keeping for ourselves -- we own  
10 the servicing rights.

11 THE COURT: Yeah, but with respect to the servicing  
12 rights, they're an agent for the owner of the loans.

13 MR. GARBER: And I can understand that argument.

14 THE COURT: It may be that they're selling the loan  
15 without recourse and all of that.

16 Go ahead; I'm sorry.

17 MR. GARBER: Okay. Well, that was the point that I  
18 wanted to make, that they declared themselves to be an  
19 independent contractor. It would --

20 THE COURT: For what purpose?

21 MR. GARBER: That would show there was no privity.

22 THE COURT: For what purpose? For the purpose of  
23 selling the loan?

24 MR. GARBER: No, this goes to servicing the loan.

25 THE COURT: Okay.

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1                   MR. GARBER: This is the contract that goes to  
2 servicing the loan.

3                   THE COURT: All right.

4                   MR. GARBER: So I think that if that were true, if  
5 there was no privity between the two, then the entire argument  
6 on res judicata: because you have a judgment against the  
7 master, it must fail if you seek a judgment against the  
8 servant -- I do think -- if the Court does not agree with me on  
9 that, I do think that there is enough Florida law out there  
10 that says that a party is not necessarily barred from suing a  
11 servant on matters not actually litigated, where they have  
12 taken a judgment against the master.

13                  THE COURT: What's the underlying theory for wrongful-  
14 death liability against GMACM?

15                  MR. GARBER: It would be that in October of 2006,  
16 after we filed a counter-claim, Mrs. Mack wrote a letter to  
17 GMAC, because she still could not understand why she was being  
18 sued, and she said: Please help us; we are being sued. We  
19 don't know what to do; please help us.

20                  And there is a section under RESPA that says where a  
21 qualifying written inquiry is made of a servicer, and that  
22 qualified written inquiry is not responded to and answered,  
23 then the servicer will be liable for damages. And that has a  
24 three-year statute of limitations under that. That is -- I can  
25 cite the Code section to you, if you want me to.

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1           THE COURT: No, the qualified written request is --  
2 yes, I know about that requirement.

3           MR. GARBER: Yes, Your Honor. And by the way, that  
4 was, of course, after the counter-claim had been filed. They  
5 had no suit against GMAC, no reason to believe that Deutsche  
6 Bank had anything --

7           THE COURT: And --

8           MR. GARBER: -- to do with the qualified written  
9 request.

10          THE COURT: And when was the request made?

11          MR. GARBER: It was made October 26th, 2009.

12          THE COURT: And when was the claim filed?

13          MR. GARBER: I believe it was made August of 2012,  
14 that we filed our proof of claim. Bankruptcy, I think, filed  
15 May --

16          THE COURT: May --

17          MR. GARBER: -- of 2000 --

18          THE COURT: -- yeah.

19          MR. GARBER: Okay.

20          THE COURT: Okay.

21          MR. GARBER: Your Honor, I imposed upon the Court's  
22 time.

23          THE COURT: No.

24          MR. GARBER: I thank you for listening.

25          THE COURT: Thank you very much, Mr. Garber.

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1                   Mr. Lewis?

2                   MR. LEWIS: Yes, thank you, Your Honor.

3                   THE COURT: So what establishes that GMAC was the  
4 agent for Deutsche Bank?

5                   MR. LEWIS: Well, Your Honor, let me start with what I  
6 think is the most decisive point. There are others, but let me  
7 start with the first one.

8                   Counsel's wrong in saying that no court in which he's  
9 been involved in this case in Florida has ever said that GMAC  
10 was the agent of Deutsche Bank. If you look at the final  
11 judgment -- the final order; that's the order that was entered  
12 after the motion to vacate, to this is the order that's entered  
13 in 2013, and if you look at paragraph 2 on the first page of  
14 that order -- and we mention this in our reply.

15                   THE COURT: Yes.

16                   MR. LEWIS: "Evidence was adduced at the hearing" --  
17 and this is evidence from the Macks, both at the original  
18 prove-up hearing and at this hearing -- "that the final  
19 judgment entered on May 5th, 2011 was received by plaintiff on  
20 or about May 11, 2011, and that GMAC Mortgage, LLC, hereinafter  
21 GMAC, as agent for plaintiff -- ". The Court found we were --  
22 that GMAC was the agent for Deutsche Bank, which was the  
23 plaintiff. It's just simple as that. I mean, there are other  
24 arguments. Whatever the contract may say, you look at the  
25 relationship. People disclaim relationships all the time.

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1 And --

2 THE COURT: Let me ask you this. What about Mr.  
3 Garber's argument, near the end of his argument, that Mrs.  
4 Garber (sic) sent a qualified written request to GMAC, as  
5 servicer, which they never responded to, and that gives rise to  
6 a RESPA claim?

7 MR. LEWIS: Well, Your Honor --

8 THE COURT: And that would be -- I think that -- well,  
9 address that, and I'll go further.

10 MR. LEWIS: Your Honor, that conflicts, first of all,  
11 with the proof of claim, which says that GMAC did respond to  
12 their inquiries; it just didn't give them the answer that they  
13 wanted or that was correct, as it turns out. But that's what  
14 it says if you read the rider. Now all of a sudden it becomes  
15 convenient, because we've pointed out that the limitations  
16 periods, and the other sections that might apply with private  
17 rights of action under RESPA, would bar their claims.

18 THE COURT: So what was the date of Mrs. Garber's  
19 (sic) letter?

20 MR. LEWIS: Well, I understand from counsel it was in  
21 October --

22 THE COURT: So --

23 MR. LEWIS: -- of 2009. So maybe I could give the  
24 Court just a little bit of a calendar that might help the Court  
25 follow --

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1                   THE COURT: Yeah, and I just want to focus on this  
2 last piece -- when I say the last piece, Mr. Garber's argument  
3 that he's got a good RESPA claim against GMACM, because in  
4 October 2009, Mrs. Garber (sic) sent a written request for  
5 information to GMACM, and they didn't respond. And he's saying  
6 that -- you're saying there's nothing in the proof of claim  
7 that --

8                   MR. LEWIS: That's right.

9                   THE COURT: -- addresses it?

10                  MR. LEWIS: And furthermore, Your Honor --

11                  THE COURT: It would be -- would you agree -- so he  
12 says they filed their proof of claim -- give me the date again,  
13 Mr. Garber. I could find it in my own notes --

14                  MR. GARBER: August the 26th, 2009, Your Honor.

15                  MR. LEWIS: The proof of claim?

16                  THE COURT: No, the proof of claim.

17                  MR. GARBER: Oh, the proof of claim.

18                  MR. LEWIS: August 8th of 2012, I think it was.

19                  THE COURT: August 8th, 2012?

20                  MR. LEWIS: Yeah.

21                  THE COURT: Okay. So it would have been within the  
22 three-year statute of limitations; you're not disputing that.

23                  MR. LEWIS: It would have been. The other answer to  
24 the argument is, however, that they knew about GMACM,  
25 obviously, and they knew about Deutsche Bank by the time

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1 Deutsche Bank sued them. And that was in late 2009.

2 THE COURT: But let me ask -- Mr. Garber, do you have  
3 a copy of that letter? Can I see it? I've got a lot of paper  
4 up here, and it may be in what I have.

5 MR. GARBER: Yes, Your Honor.

6 THE COURT: Well, let me ask, Mr. Lewis, do I have it  
7 in the binder?

8 MR. GARBER: I have it in my binder.

9 THE COURT: No, but I mean --

10 MR. LEWIS: Not in ours, no, Your Honor.

11 THE COURT: Okay. May I just see that. I'll give it  
12 back to you, so --

13 MR. GARBER: Yes, Your Honor. Let me see if I can  
14 find it.

15 MR. LEWIS: While he's finding that, Your Honor --

16 THE COURT: Well, let's wait --

17 MR. LEWIS: Okay.

18 THE COURT: -- because I want him to be able to pay  
19 attention to your argument --

20 MR. LEWIS: Sure.

21 THE COURT: -- while he's looking for something for  
22 me.

23 MR. LEWIS: Be one of the few people who don't want to  
24 pay attention to my argument.

25 MR. GARBER: It's Exhibit C in our binder. May I pull

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1 out a copy of it --

2 THE COURT: Yes, please, just -- and I'll give it back  
3 to you when we finish the argument, okay?

4 MR. GARBER: May I approach, Your Honor?

5 THE COURT: Yes, please, come on up.

6 Okay. Mr. Lewis, you have a copy as well?

7 MR. LEWIS: I do, Your Honor.

8 THE COURT: Okay. Let me read it, and then -- okay.

9 (Pause)

10 THE COURT: Okay, so let me ask you first, Mr. Lewis,  
11 would you agree that Exhibit C, which is at ECF 6834-3, which  
12 was filed on April 29th, 2014 here, that that letter would  
13 satisfy the requirements of a qualified written request?

14 MR. LEWIS: Yes, I do, Your Honor.

15 THE COURT: Okay. And let's put aside for a minute --  
16 I understand your argument that the proof of claim does not  
17 allege, as a basis for the claim, a QWR and failure to respond.  
18 I'm not rejecting your argument --

19 MR. LEWIS: I understand, Your Honor.

20 THE COURT: -- about it, but I just want to probe  
21 further. Okay.

22 MR. LEWIS: Sure.

23 THE COURT: Do you agree, for purposes of argument,  
24 that GMACM -- that you've agreed that this would satisfy the  
25 requirements for a qualified written request, that GMAC was

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1 required to respond to the borrower?

2 MR. LEWIS: If it satisfied the requirements, yes, it  
3 would be required to respond.

4 THE COURT: And do you agree that GMACM didn't  
5 respond?

6 MR. LEWIS: That I don't know, Your Honor, for sure.

7 (Pause)

8 THE COURT: So assume hypothetically that this Exhibit  
9 C is a qualified written request and that GMACM didn't respond.  
10 I know you say you don't know. Let's just assume --

11 MR. LEWIS: All right.

12 THE COURT: -- for purposes of the discussion --

13 MR. LEWIS: Uh-huh.

14 THE COURT: -- they didn't respond. Would you agree,  
15 if those two statements I just made were true, that the Macks  
16 could assert a claim against GMACM for violation of RESPA?

17 MR. LEWIS: Yes.

18 THE COURT: And that -- under RESPA, that would  
19 properly be a claim against GMACM and not against Deutsche  
20 Bank?

21 MR. LEWIS: Because Deutsche Bank's not the servicer.

22 THE COURT: Correct. Okay.

23 MR. LEWIS: Yes.

24 THE COURT: So -- all right. So with respect to this  
25 prong of Mr. Garber's argument, I guess we have the

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1       uncertainty; you don't know whether GMACM responded to it.

2           Mr. Garber, your contention -- your representation is  
3       they did not, correct?

4           MR. GARBER: Your Honor, they did not. And we've  
5       discussed this many times in our post-judgment thing. I don't  
6       think they --

7           THE COURT: Okay. Okay, I --

8           MR. GARBER: -- even allege they had it.

9           THE COURT: Okay. I guess the issue would then  
10      become -- Mr. Garber, you agree it's not in the proof of claim,  
11      this contention?

12           MR. GARBER: I did not specify that in the proof of  
13      claim, but the proof of claim is just a brief itemization; it  
14      was not the details that we have of everything required to  
15      prove a case.

16           THE COURT: Okay. And, Mr. Lewis, was the request for  
17      additional information served on the Macks? I know this is not  
18      an omni -- well, I guess this was part of an omnibus objection.

19           MR. LEWIS: No, Your Honor, it wasn't.

20           THE COURT: Okay. So as to this aspect, the Court  
21      would have to decide whether to permit the late filing of a  
22      claim and whether this -- I got to read the claim again. I  
23      must say, I've read a lot of stuff, I've read a lot of cases; I  
24      haven't gone back to read the proof of claim. I got to go back  
25      and read the proof of claim, see whether this prong -- when I

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1 say "this prong", whether GMAC violated RESPA in failing to  
2 respond. I got to go back and look at that, among other  
3 things.

4 I guess -- would you agree the analysis, in the first  
5 instance, has to be whether this argument is fairly raised by  
6 the proof of claim? And in other cases I've held, I  
7 essentially apply Rule 8, Federal Rule of Civil Procedure --

8 MR. LEWIS: Yeah, it would be the same test.

9 THE COURT: Okay.

10 MR. LEWIS: I mean, we've been through the late-claim  
11 issue a number of times --

12 THE COURT: We have.

13 MR. LEWIS: -- with the Court.

14 THE COURT: We have. And if it's not encompassed  
15 within the claim, I'd have to decide whether to permit it as an  
16 amendment, a late-filed claim, correct?

17 MR. LEWIS: Yes.

18 THE COURT: Something I'm not prepared to decide now.

19 MR. LEWIS: Understood, Your Honor. And there is  
20 another answer here --

21 THE COURT: Okay, go ahead and give it to me.

22 MR. LEWIS: -- and the other answer here is, this  
23 occurred -- this incident occurred in October of 2009. The  
24 Macks didn't get their final, final judgment until 2013. And  
25 there's no reason why they could not have added this claim to

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1       their claims against Deutsche Bank; not because Deutsche Bank  
2       was guilty of it.

3           THE COURT: Well, but --

4           MR. LEWIS: But just like every claim that --

5           THE COURT: No, but Deutsche Bank would have been  
6       argu -- Deutsche Bank came back to vacate the judgment on the  
7       grounds, it can't be RESPA judgment against us, RESPA doesn't  
8       apply to us, we're not the loan servicer.

9           So to amend a complaint against Deutsche Bank to  
10      assert a RESPA claim that you would have to acknowledge  
11      couldn't be asserted against Deutsche Bank --

12           MR. LEWIS: I don't think that's true, Your Honor.

13           THE COURT: You don't?

14           MR. LEWIS: Yeah. Just like -- there is no reason why  
15      they couldn't have tried to hold Deutsche Bank liable for  
16      GMAC's RESPA conduct, just as they tried to hold Deutsche Bank  
17      liable for a lot of other things that --

18           THE COURT: Well, Deutsche Bank was successful in  
19      getting the RESPA claim --

20           MR. LEWIS: Well, then it's done.

21           THE COURT: -- vacated.

22           MR. LEWIS: It's precluded.

23           THE COURT: Well, you may think so, but that's what  
24      I've got to decide. I mean, that argument I find much less  
25      appealing that the Macks had to assert an invalid RESPA claim

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1 against Deutsche Bank in order to save a RESPA claim against  
2 the party against whom it properly could be asserted: GMACM.  
3 And then of course -- so if everything other than this was  
4 disposed of, okay -- I mean, you have strong res judicata  
5 arguments; very strong res judicata arguments, okay? But a  
6 little different as to this qualified written request. I mean,  
7 this I haven't looked at, okay? But Mr. Garber acknowledged a  
8 split of authority among the circuits, as to whether personal-  
9 injury, emotional-distress damages are recoverable in  
10 connection with a RESPA claim. I have no idea. That's one  
11 that has not -- I've had a lot of RESPA, TILA, but not this,  
12 okay, and I'm not prepared to rule on it.

13 Go ahead if you want to say something else, Mr. Lewis.

14 MR. LEWIS: Your Honor, the other thing I want to say  
15 is kind of related to the last point on a larger scale, which  
16 is, part of counsel's pitch was that they never would have sued  
17 GMAC because they didn't know what GMAC's role --

18 THE COURT: I don't know whether they would have sued  
19 GMAC --

20 MR. LEWIS: It doesn't matter.

21 THE COURT: No, I don't care about that.

22 MR. LEWIS: Yeah.

23 THE COURT: That I don't think --

24 MR. LEWIS: Yeah.

25 THE COURT: When I say I don't care about it, that's

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1 just not important to --

2 MR. LEWIS: Yeah.

3 THE COURT: -- what I have to decide.

4 MR. LEWIS: Yeah. What matters is what was sued  
5 for --

6 THE COURT: Just --

7 MR. LEWIS: -- or could have been sued for.

8 THE COURT: I don't get any traction from your  
9 argument that they should have asserted a RESPA claim against  
10 Deutsche Bank for not responding to a qualified written request  
11 to GMACM.

12 MR. LEWIS: Well, if I can impose on the Court just a  
13 little bit more --

14 THE COURT: Go ahead.

15 MR. LEWIS: -- on that? Thank you. I mean, the fact  
16 that Deutsche Bank can't be liable on a RESPA claim directly  
17 doesn't mean they could not have argued for -- and frankly, I  
18 don't know whether they did argue this -- for Deutsche Bank's  
19 liability not as the wrongdoer itself but as the --

20 THE COURT: Well --

21 MR. LEWIS: -- agent -- as the -- because they already  
22 knew --

23 THE COURT: Look, if they had alleged that Deutsche  
24 Bank was liable in a RESPA claim as the principal for GMACM,  
25 its agent, and the Court had ruled on that aspect of the claim,

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1 I have very little problem determining that res judicata  
2 applied to it. But there was nothing -- there's nothing in the  
3 pleadings, that I saw -- and I think you acknowledge that they  
4 didn't allege --

5 MR. LEWIS: But they could have --

6 THE COURT: Well --

7 MR. LEWIS: -- and they should have. And that's --

8 THE COURT: Okay, I have your --

9 MR. LEWIS: -- what res jud --

10 THE COURT: I have your argument.

11 MR. LEWIS: Okay. -- because that's what res  
12 judicata's all about.

13 THE COURT: I have your argument. All right.

14 MR. LEWIS: Thank you, Your Honor.

15 THE COURT: Thank you very much --

16 MR. LEWIS: I appreciate the time.

17 THE COURT: -- Mr. Lewis.

18 MR. GARBER: Your Honor, may I make two quick  
19 observations?

20 THE COURT: Yes, and you can come back up and I'll  
21 give you this --

22 MR. GARBER: Okay.

23 THE COURT: -- back, okay?

24 MR. GARBER: You granted us far too much time for your  
25 schedule, so I want to be as brief as I possibly can. Number

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1 one, a violation of RESPA is purely statutory; there's no  
2 common-law RESPA violations. And the RESPA code says that the  
3 duty of the loan servicer to respond to borrower inquiries, if  
4 any servicer of a federally-related mortgage loan receives a  
5 qualified written response --

6 THE COURT: Request.

7 MR. GARBER: -- they -- a qualified written request,  
8 they shall file a response within twenty days. And there is no  
9 statutory authority for suing a principal; only --

10 THE COURT: Okay.

11 MR. GARBER: The other point that I want to bring up  
12 is that under the final-final judgment that they were talking  
13 about -- that was the one where the Court confirmed the slander  
14 of title but denied the RESPA -- this is the language -- and  
15 the language is confusing but I do think it is clear -- says  
16 this: "Evidence was adduced at that hearing" -- that's the  
17 hearing to overturn the loan -- the judgment -- "that the final  
18 judgment entered on May 5th, 2011 was received by the  
19 plaintiff", that is, Deutsche Bank, "on or about May 11th, 2011  
20 and that GMAC Mortgage, as agent for Plaintiff, had the  
21 responsibility to investigate the final judgment." I don't  
22 know that that was a finding of fact. That was the evidence  
23 that was presented. If it was a finding of fact, they were the  
24 agent to investigate the judgment.

25 THE COURT: Well, I don't think that's what it says,

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1 but anyway.

2 MR. GARBER: Okay.

3 THE COURT: Okay, here's what I'm going to require;  
4 we're not going to be done with this yet: Mr. Garber, I'm  
5 going to permit each side to file a supplemental brief on the  
6 issue of whether the proof of claim on file properly raises the  
7 issue of GMACM committing a RESPA violation in failing to  
8 respond to a qualified written request, your Exhibit C.

9 You should also address, if the Court concludes that  
10 the proof of claim does not fairly raise the issue, whether the  
11 Court should permit an amendment to assert a late-filed claim  
12 for this RESPA violation. That's second.

13 And third -- and, Mr. Lewis, what I'm asking him I'm  
14 asking you as well -- to address whether damages for wrongful  
15 death, emotional distress, personal injury, are recoverable for  
16 a RESPA violation, for this RESPA violation, assuming it was a  
17 violation. Okay.

18 What I'd ask the two of you to do is this: when we  
19 break very soon, confer on a briefing schedule. I'd be  
20 perfectly happy to get simultaneous submissions but, if you  
21 want -- if the parties agree to do it otherwise with Garber-  
22 Lewis-Garber, I'll go along with that, okay? But I want those  
23 three issues addressed.

24 I generally impose page limits, and one should never  
25 feel compelled to use every page that I say you can use, okay?

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1 All right. With some reluctance I'm going to impose twenty-  
2 page limits. It could be a lot shorter. I don't think you'll  
3 be -- I read -- okay, put it this way, Mr. Garber: I actually  
4 read the cases you cite, okay? So you don't have to feel like  
5 you got to spend three pages discussing everything about every  
6 case you cite, okay, because I really do read the cases. All  
7 right. So, shorter is better than longer. Frequently I set,  
8 on supplemental briefings, something a lot less than twenty  
9 pages, but I'm going to allow either side -- each side to do  
10 twenty pages.

11 After I get -- you'll agree on a schedule; you can  
12 submit it to me in a letter -- you don't have to file a  
13 pleading, okay; just so I know what the timing's going to be.  
14 When I get those briefs, I'll decide whether I want to hear  
15 more argument.

16 I'll permit you to appear by telephone, Mr. Garber, if  
17 you want to do that. I do that with -- usually in argument I  
18 prefer that lawyers be here, but I'm not going to have you come  
19 from Florida for -- so I'll permit you to appear by telephone.

20 I may decide, after I review the briefs, that I'm just  
21 going to take it under submission on the papers and go ahead  
22 and decide the matters. Okay?

23 MR. LEWIS: Your Honor, does the Court have, sort of,  
24 deadlines or whatever the initial filing's going to be, in  
25 mind?

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1           THE COURT: No, I want -- look, your -- the briefing  
2 was extensive and good on this. I'm going to let the two of  
3 you work out a schedule. I've moved my calendar along, so I'm  
4 not talking about a really extended --

5           MR. LEWIS: Sure.

6           THE COURT: -- schedule. But in the first instance,  
7 I'll believe you'll both act in good faith and try and come up  
8 with a schedule that works for both of you, okay?

9           MR. LEWIS: Thank you, Your Honor.

10          MR. GARBER: Okay. Thank you.

11          THE COURT: All right. And then, so -- I mean, you  
12 can file the letter on ECF, but also e-mail a copy to my  
13 chambers, because otherwise -- I don't look at every post --  
14 everything that gets filed on ECF, okay? So you'll e-mail a  
15 copy of the letter to chambers. And when you file the briefs,  
16 you'll file them on ECF but you'll send a copy to the Court,  
17 okay?

18          MR. LEWIS: Okay.

19          THE COURT: And, Mr. Garber, I'd permit you to e-mail  
20 a copy of the brief to my law clerk so that -- you know, you'll  
21 file on ECF but send a copy of the brief to chambers as well,  
22 okay --

23          MR. GARBER: Yes, Your Honor.

24          THE COURT: -- courtesy copy.

25          MR. GARBER: Your Honor, it is -- the Court has been

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1 kind enough to allow me to appear pro hac vice, and I  
2 understood it was for this hearing.

3 THE COURT: Yeah. Yeah.

4 MR. GARBER: Will you extend that --

5 THE COURT: Did you file an application for pro hac?

6 MR. GARBER: Yes, Your Honor, I did.

7 THE COURT: Did I sign it?

8 MR. GARBER: Yes, Your Honor, you did that.

9 THE COURT: Well, it's nice to have you here.

10 MR. GARBER: Okay, thank you. So I can continue on --

11 THE COURT: Absolutely.

12 MR. GARBER: -- in this case?

13 THE COURT: Once you're here for this case, you're  
14 here.

15 MR. GARBER: Okay.

16 THE COURT: Okay?

17 MR. GARBER: Thank you, Your Honor.

18 THE COURT: All right. Thank you very much.

19 One last comment: As always, I urge both sides to see  
20 whether you can resolve this matter consensually by settlement;  
21 I think that ought to be the first order of business. If you  
22 believe you're in -- so I'm letting you send me a letter -- I'd  
23 like a letter within about a week, with the schedule. If  
24 you're engaged -- if you believe you're engaged in good-faith  
25 settlement talks, put that in the letter, and the schedule can

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1 be adjusted accordingly. Before both sides spend money with  
2 your time researching and writing a brief, I think you ought to  
3 see whether you can resolve -- if you can't, I'll go ahead and  
4 decide it, but I -- okay?

5 MR. GARBER: Thank you, Your Honor.

6 THE COURT: Thank you very much, Mr. Garber.

7 Okay, thanks, Mr. Wishnew.

8 Thanks, Mr. Lewis.

9 MR. WISHNEW: Your Honor --

10 THE COURT: All right, we're adjourned. Wait, we --

11 MR. WISHNEW: I'm sorry.

12 THE COURT: -- we have more. Oh, we have the omnibus.  
13 Sorry.

14 MR. WISHNEW: No, no, no. No omnibus today, Your  
15 Honor.

16 THE COURT: No, no, but --

17 MR. WISHNEW: Just --

18 THE COURT: -- we do have --

19 MR. WISHNEW: -- two uncontested objections.

20 THE COURT: Thought we had the fiftieth, fifty-eighth  
21 and fifty-ninth omnibus objections.

22 MR. WISHNEW: We resolved those or pushed them to  
23 further hearings, Your Honor. The two matters that are also  
24 going forward today are items --

25 THE COURT: Yeah, there were two object -- the James

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1 Jackson is uncontested, and the Gerald Gandrup.

2 MR. WISHNEW: That's correct, Your Honor. Right.

3 THE COURT: Okay, those were part of the -- one of the  
4 omnibus --

5 MR. WISHNEW: Actually, Your Honor, just by way of  
6 background, James Jackson was originally part of the fiftieth  
7 omnibus. You had denied -- or -- sorry -- the Court had denied  
8 without prejudice the objection, because in the reply -- the  
9 omnibus reply we filed on the fiftieth objection --

10 THE COURT: It was a mistake; you had the wrong  
11 argument --

12 MR. WISHNEW: We kind of changed --

13 THE COURT: Yes. Okay.

14 MR. WISHNEW: -- the argument a little bit. And so  
15 we --

16 THE COURT: I know.

17 MR. WISHNEW: -- essentially refiled the objection  
18 on -- making similar arguments. Mr. Jackson has not replied --  
19 or not responded to our objection, so we're --

20 THE COURT: Okay. Is Mr. Jackson on the phone?

21 Objection's sustained.

22 MR. WISHNEW: Thank you, Your Honor. Similarly with  
23 the Gerald --

24 THE COURT: And when I say -- I ruled quickly. I did  
25 review the papers. I've considered it. I believe the

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1 objection's well taken. The objection's sustained.

2 MR. LEWIS: Thank you, Your Honor. We'll submit an  
3 order to chambers.

4 With regards to Mr. Gandrup's claim, a similar  
5 instance where there was a previously filed objection; we  
6 withdrew it because our earlier basis was that it should be --  
7 the claim should be dismissed because he dismissed his  
8 litigation, when in fact what we realized was that he dismissed  
9 his litigation because he sought to preserve it through his  
10 claim. So we refiled an objection to his claim, addressed the  
11 substantive bases and the counts within his complaint that was  
12 stayed by the bankruptcy filing. And again, Mr. Gandrup did  
13 not reply, and so we would move to have that objection granted  
14 as well, Your Honor.

15 THE COURT: All right.

16 (Pause)

17 THE COURT: All right, I'm going to read my decision  
18 into the record. Okay, I'm going to sustain the objection to  
19 the Gandrup claim. Gerald Gandrup filed claim 4167 against  
20 ResCap in the amount of one million dollars, based on claims  
21 originally asserted by Gandrup in a wrongful-foreclosure action  
22 in federal court in the Northern District of California.  
23 Gandrup initiated the foreclosure action in 2011, asserting  
24 claims against Debtors GMACM and ETS, along with other  
25 defendants, stemming from the foreclosure sale of his home.

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1 The debtor defendants filed a motion to dismiss Gandrup's  
2 amended complaint, which the district court granted on  
3 September 12th, 2012, granting Gandrup leave to amend certain  
4 claims.

5 On October 1, 2012, Gandrup filed a second amended  
6 complaint asserting six causes of action: one, violations of  
7 TILA; two, violations of RESPA; three, fraud; four, civil RICO  
8 violations; five, rescission, mistake, void agreement; and six,  
9 invasion of his constitutional right to privacy. The debtor  
10 defendants filed a motion to dismiss the second amended  
11 complaint.

12 On October 22, 2012, Gandrup filed a notice of  
13 voluntary dismissal, indicating that he was voluntarily  
14 dismissing the Gandrup litigation without prejudice to all  
15 defendants, including the debtor defendants.

16 On November 9, 2012, Gandrup filed the Gandrup claim  
17 as a general unsecured claim against ResCap in the amount of  
18 one million dollars. As the basis for the claim, the proof of  
19 claim attached a reference to the foreclosure action; that was  
20 the Northern District of California, the first action.

21 The debtors objected to the Gandrup claim in the  
22 debtors' fiftieth omnibus objection to claims, no-liability  
23 claims, books and records. The omnibus objection was at ECF  
24 docket number 5162, stating as the reason for disallowance,  
25 "Litigation voluntarily dismissed". Gandrup filed a response

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1 to the omnibus objection -- the response is at ECF docket  
2 5541 -- explaining that they dismissed the foreclosure action  
3 with prejudice because that action would have been stayed due  
4 to the filing of these Chapter 11 cases. Gandrup explained  
5 that the causes of action asserted in the foreclosure action  
6 formed the basis of his claims here, and he attached to the  
7 response a copy of the second amended complaint.

8 On January 23, 2014, the trust and Mr. Gandrup entered  
9 into a stipulation to withdraw without prejudice the omnibus  
10 objection to the Gandrup claim. The debtors now object to  
11 Gandrup's claim, on the grounds that Gandrup has failed to  
12 state a basis for liability against the debtors for the  
13 following reasons:

14 One, Gandrup's right to challenge the foreclosure was  
15 terminated because in California a properly conducted  
16 nonjudicial foreclosure sale constitutes a final adjudication  
17 of the rights of the borrower and the lender. See *Moeller v.*  
18 *Lien*, 25 Cal.App.4th 822 at 831 (1994) (citing *Smith v. Allen*,  
19 68 Cal.2d 93 at 96 (1968)). And Gandrup did not proffer any  
20 facts to establish that the foreclosure sale was not properly  
21 conducted sufficient to overcome the presumption.

22 Two, Gandrup failed to rebut the presumption that the  
23 foreclosure sale was proper.

24 Three, Gandrup did not tender the loan amount, as  
25 required under California law, in order to challenge a

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1 foreclosure sale, and his complaint therefore fails. It's the  
2 so-called tender rule.

3 Four, securitizing a loan is not improper. See *Lane*  
4 v. *Vitek Real Estate Industries Group*, 713 F.Supp.2d 1092 at  
5 1099 (E.D. Cal. 2010) ("The argument that parties lose their  
6 interest in a loan when it is assigned to a trust pool has also  
7 been rejected by many district courts.")

8 Five, Gandrup's claim for TILA violations fails  
9 because GMACM was not the original lender of his loan and, even  
10 if it were, his claims are time-barred. The state-court action  
11 was not filed until four years after the loan was originated,  
12 and damage claims under TILA have a one-year statute of  
13 limitations. See 15 U.S.C. Section 1640(e).

14 Six, Gandrup cannot receive his loan based upon  
15 alleged TILA violations, because of the three-year statute of  
16 limitations in 15 U.S.C. Section 1635(f), and he brought his  
17 claim more than three years after loan origination, and he also  
18 did not return the loan principal minus all interest and fees  
19 paid to the creditor after closing, as required by TILA.

20 Seven, Gandrup's claims under RESPA fail because  
21 they're time-barred. See 12 U.S.C. Section 2614. And his  
22 second amended complaint is devoid of any factual allegations  
23 specific to the debtors.

24 Eight, Gandrup's fraud claim fails because it is time-  
25 barred and not pled with sufficient particularity.

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1           Nine, Gandrup's claim for civil RICO violations fails  
2 because he does not plead the required elements (conduct of an  
3 enterprise, through a pattern of racketeering activity,  
4 establishing that the defendant caused injury to the  
5 plaintiff's business or property).

6           Ten, Gandrup's rescission claim fails because he could  
7 not void the deed of trust without paying his debt.

8           Eleven, Gandrup's invasion of constitutional right to  
9 privacy under the California Constitution, that claim fails  
10 because, one, it is insufficiently pled and, two, a credit  
11 check does not qualify as a serious invasion of privacy  
12 interest sufficient to establish a claim under the California  
13 Constitution. See *Smith v. Capital One Finance Corp.*, number  
14 C 11-3425 (PJH) (2012 WL 3138024 at \*3) (N.D. Cal. Aug. 1,  
15 2012) ("Because plaintiff concedes that she incurred a  
16 financial obligation, she impliedly consented for the creditor  
17 to take reasonable steps to pursue payment, even though it may  
18 result in actual, though not actionable, invasion of privacy.")

19           And twelve, the amount of the Gandrup claim is not  
20 supported by sufficient documentation.

21           The debtors' objection is supported by the declaration  
22 of Lauren Graham Delehey, which attaches supporting  
23 documentation, including, one, the request letter sent by the  
24 debtors to Gandrup -- it's a request for more information; two,  
25 the deed of trust; three, the substitution of trustee; four,

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1 payment records; five, the notice of default; six, the notice  
2 of trustee's sale; seven, the trustee's deed upon sale; eight,  
3 the dismissal order; nine, Gandrup's second amended complaint;  
4 and ten, a notice of voluntary dismissal; and eleven, the  
5 voluntary-dismissal order.

6 The debtors' objection is well taken and supported by  
7 relevant evidence. Through the Gandrup objection, the debtors  
8 shifted the burden to Gandrup to prove the validity of the  
9 claim by a preponderance of the evidence; Gandrup failed to  
10 respond. The Court therefore concludes that the Borrowers'  
11 Trust's objection to the Gandrup claim is sustained and the  
12 claim is expunged.

13 MR. WISHNEW: Thank you very much, Your Honor. That  
14 is the last matter going forward today, and so --

15 THE COURT: What you should do with respect to the  
16 ruling on the Gandrup claim is prepare a separate order  
17 indicating that the objection to the Gandrup claim is sustained  
18 and the claim is expunged for the reasons stated on the record  
19 during the hearing.

20 MR. WISHNEW: I will do that, Your Honor, and submit  
21 something electronically to chambers.

22 THE COURT: Okay. Thank you very much --

23 MR. WISHNEW: Thank you very much --

24 THE COURT: -- Mr. Wishnew.

25 MR. WISHNEW: -- for your time, Your Honor.

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1 THE COURT: Thank you.

2 Have a safe trip home, Mr. Garber.

3 MR. GARBER: Thank you, Your Honor.

4 (Whereupon these proceedings were concluded at 11:47 AM)

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	I N D E X		
	RULINGS		
		Page	Line
4	Ally Financial Inc.'s motion for an order	19	5
5	enforcing the Chapter 11 plan injunction		
6	will be taken under submission the issue, and		
7	Ally's counsel is directed to submit, within		
8	seven days from the date of the order, a		
9	declaration and supporting information		
10	detailing the amount of fees and costs that it		
11	seeks to recover in connection with the making		
12	of the motion, and providing Brookstone Law		
13	with seven days to file a response.		
14	As to the Macks' objection, each side is	68	5
15	permitted to file a supplemental brief on the		
16	issue of whether the proof of claim on file		
17	properly raises the issue of GMACM committing		
18	a RESPA violation in failing to respond to a		
19	qualified written request.		
20	The ResCap Borrower Claims Trust's Objection	74	1
21	to Claim No. 4664 of James C. Jackson,		
22	sustained.		
23	The ResCap Borrower Claims Trust objection to	79	11
24	Claim No. 4167 filed by Gerald Gandrup,		
25	sustained, and the claim is expunged.		

## C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript is a true and accurate record of the proceedings.

Shanna Shapire

SHARONA SHAPIRO

AAERT Certified Electronic Transcriber CET\*\*D 492

Scanibang

700 West 183rd Street Suite #607

New York NY 10040

Date: May 18, 2014

May 15, 2014

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